

Before the  
Federal Communications Commission  
Washington, D.C. 20554

MM Docket No. 84-281

In the Matter of  
Nighttime Operations on Canadian,  
Mexican, and Bahamian Clear Channels

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: July 28, 1987;

Released: August 12, 1987

By the Commission:

INTRODUCTION

1. The purpose of this Notice is to invite comment on proposed rules to govern the establishment of new unlimited-time AM stations on the foreign Class I-A clear channels. This action is being taken pursuant to a remand from the United States Court of Appeals for the Second Circuit in *National Black Media Coalition v FCC*, 791 F.2d 1016 (2d Cir. 1986).

2. This proceeding<sup>1</sup> was begun to consider possible changes to the rules governing the use of the 14 Canadian, Mexican and Bahamian Class I-A clear channels.<sup>2</sup> For many years, international agreements precluded use of these foreign clear channels at night in large parts of the United States. However, new international agreements which had been or were being negotiated, made it possible to use these frequencies more extensively at night, and the Commission sought comment on their most effective use. Originally, the Commission proposed rules along the lines then employed for the 25 U.S. Class I-A clear channels. Under this proposal, applications could be accepted for filing if they were designed to serve unserved or underserved areas or communities. Alternatively, in already served areas, the Commission proposed to accept applications filed by minorities or noncommercial entities.

3. However, the Commission did not adopt non-technical acceptance criteria based on service considerations or on the nature of the entity filing the application. The Commission decision in this regard was based on the results of its studies, corroborated by comments in the record (see 103 FCC 2d at 534) that showed that, because of the Commission's technical rules, most opportunities to establish new stations would occur in unserved or underserved areas.<sup>3</sup> Thus, it was unnecessary to impose the service-based non-technical acceptability requirements designed to encourage the filing of applications for facilities in those underserved areas. Moreover, since the ownership-based non-technical acceptance criteria were designed as an exception to the service-based criteria, there was no need to provide an alternative basis for accepting applications based on the nature of the applicant.

4. The National Black Media Coalition (NBMC), appealed the matter to the United States Court of Appeals for the Second Circuit. NBMC asserted that the Commission had improperly refrained from adopting special provisions for minority and noncommercial applicants; and that there were procedural defects in the Commission's action in that regard, notably in diverging from its original proposal and in failing to give interested parties the opportunity to comment on the results of the Commission's studies. The Court agreed that the Commission's action did not fully meet the requirements of the Administrative Procedure Act, and it remanded the matter to the Commission.<sup>4</sup> In particular, the Court expressed concern over the adoption of rules that sharply differ from those proposed, especially when the Commission's decision was based on studies on which the public did not have a prior chance to comment. 791 F.2d 1016, 1022-1023.

INVITATION TO COMMENT

5. Interested parties are invited to comment on our proposal to accept applications on these channels without imposition of the non-technical acceptance criteria. Subsequent to the adoption of the Notice in this proceeding, the Commission adopted the *Report and Order* in MM Docket No. 85-39, 50 FR 51528 (1985), which eliminated similar acceptance criteria for other AM channels.<sup>5</sup> Commenters in this proceeding are specifically asked to address the conclusion in MM Docket No. 85-39 that, although the non-technical acceptance criteria have been instrumental in furthering our objective of increasing AM service to unserved and underserved areas during the development of the AM service, that service is now mature, and such rules would no longer serve the public interest. 50 FR 51529. That is, since similar rules were found no longer necessary with regard to 93 of the available 107 AM channels, the question arises as to whether they are necessary for these 14 remaining channels. On the basis of our engineering studies of these channels, using our interference-limiting technical rules, we believe that opportunities on these 14 channels are not so significantly greater than those found on the other 93 channels as to warrant departure from our conclusions in MM Docket No. 85-39. We invite comment on the accuracy and utility of our studies in support of these tentative conclusions.

6. In this regard, we recognize that there have been ample opportunities to apply for the other 93 channels under the old rules, 50 FR 51528, 51530-51531, and that there have been no similar opportunities to apply for these 14 foreign clear channels. Commenters are urged to address the significance of this distinction, if any, to our proposal. Moreover, we believe that, because technical rules severely limit the availability of these channels, there does not appear to be any reason to impose any of the non-technical acceptance criteria, in that they would be largely redundant in view of the interference-based limits. Thus, any potential benefits, at best slight, that these non-technical criteria might possibly yield appear to be outweighed by their negative consequences. That is, they prevent whatever spectrum remains available in the mature AM service from being used where it is most needed.

7. Recognizing the importance of our interference studies to our tentative conclusions, and the concerns that have been expressed in the earlier studies, the staff has performed new studies to determine the degree to which existing stations would preclude the establishment of new

unlimited-time stations on the foreign clear channels.<sup>7</sup> These studies differ in two respects from the studies done earlier. First, the new studies have dealt with the situation on all 14 foreign clear channels. More importantly, they have taken into account not only co-channel and first adjacent channel considerations, but the effect of operations on second and third adjacent channels as well.

8. The studies were based on calculations using the Commission's database of existing stations and their technical characteristics. Using this information, the Commission's computer calculated the locations of the pertinent protected contours for the co-channel and first adjacent stations in question and plotted this information on a map of the United States.<sup>8</sup> The computer also determined the location of second and third adjacent channel stations, and this information was depicted on the map by the placement of asterisks. Because the effect of a second adjacent channel extends further than that of a third adjacent channel, two sizes of asterisks were employed. Finally, to make use of the maps easier, the information was displayed in the form of cross-hatching for precluded areas. These maps are attached as Appendix B to this *Further Notice*, and we specifically invite comment on them. In addition, we request that commenting parties submit any other pertinent data that they believe we should consider regarding the degree of preclusion.

9. In summary, we reopen this proceeding and invite the comments of interested parties on our proposal to permit any qualified person who complies with our technical standards to apply for a new AM station on a Class I-A foreign clear channel. Under this proposal, it would not be necessary to meet non-technical criteria relating to the current level of service to the community or area to be served or relating to the status of the applicant as a minority or noncommercial entity.

10. The rule amendments on which further comment is invited are being proposed under the authority contained in sections 4(i), 303(r) and 307(b) of the Communications Act of 1934, as amended.

11. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before October 5, 1987, and reply comments on or before October 20, 1987. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In order to file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C.

12. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rule making until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written

or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See, generally, section 1.1231 of the Commission's Rules, 47 CFR 1.1231.

13. The Secretary of the Commission is directed to send a copy of this *Further Notice* to the Chief Counsel for Advocacy of the Small Business Administration in accordance with section 603(a) of the Regulatory Flexibility Act, Pub. L. 96-354, 94 Stat. 1164, U.S.C. 601 *et seq.* (1981).

14. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase burden hours imposed on the public.

15. As required by section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IFRA) of the expected impact of these proposed policies and rules on small entities. The IFRA is attached as Appendix A. Written public comments are requested on the IFRA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall cause a copy of this *Notice of Proposed Rule Making*, including the Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with section 603(a) of the Regulatory Flexibility Act, Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.*, (1981).

16. For further information regarding matters covered in this document, please contact Louis C. Stephens, (202) 254-3394.

#### FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico  
Secretary

## APPENDIX A REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS:

### I. Reason for Action:

This matter has been remanded to the Commission to conduct the further rule making that is initiated by this Notice.

### II. Objective:

The goal is to establish appropriate standard for the establishment of new full-time stations on the foreign clear channels. Interested persons are afforded an opportunity to comment on the Commission's view that technical standards are appropriate but that it would be inappropriate to apply non-technical application acceptance criteria, including those based on the minority status of the applicant.

### III. Legal Basis:

This further rule making is conducted pursuant to the above-cited remand order and in accordance with sections 4(i), 303 and 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. 4(i), 303, and 307.

### IV. Description, Potential Impact, and Number of Small Entities Affected:

Thus far, more than 320 daytime-only stations have been authorized to operate at night. The remaining effect on small entities would occur as a result of the opportunity to file an application for a new station on one of the foreign clear channels. In view of the existing pattern of use, the rules proposed are not expected to have a notable effect on such opportunities.

### V. Reporting, Record Keeping and Other Compliance Requirements: None.

### VI. Federal Rules which Overlap, Duplicate, or Conflict with These Rules: None.

### VII. Any Significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives: None.

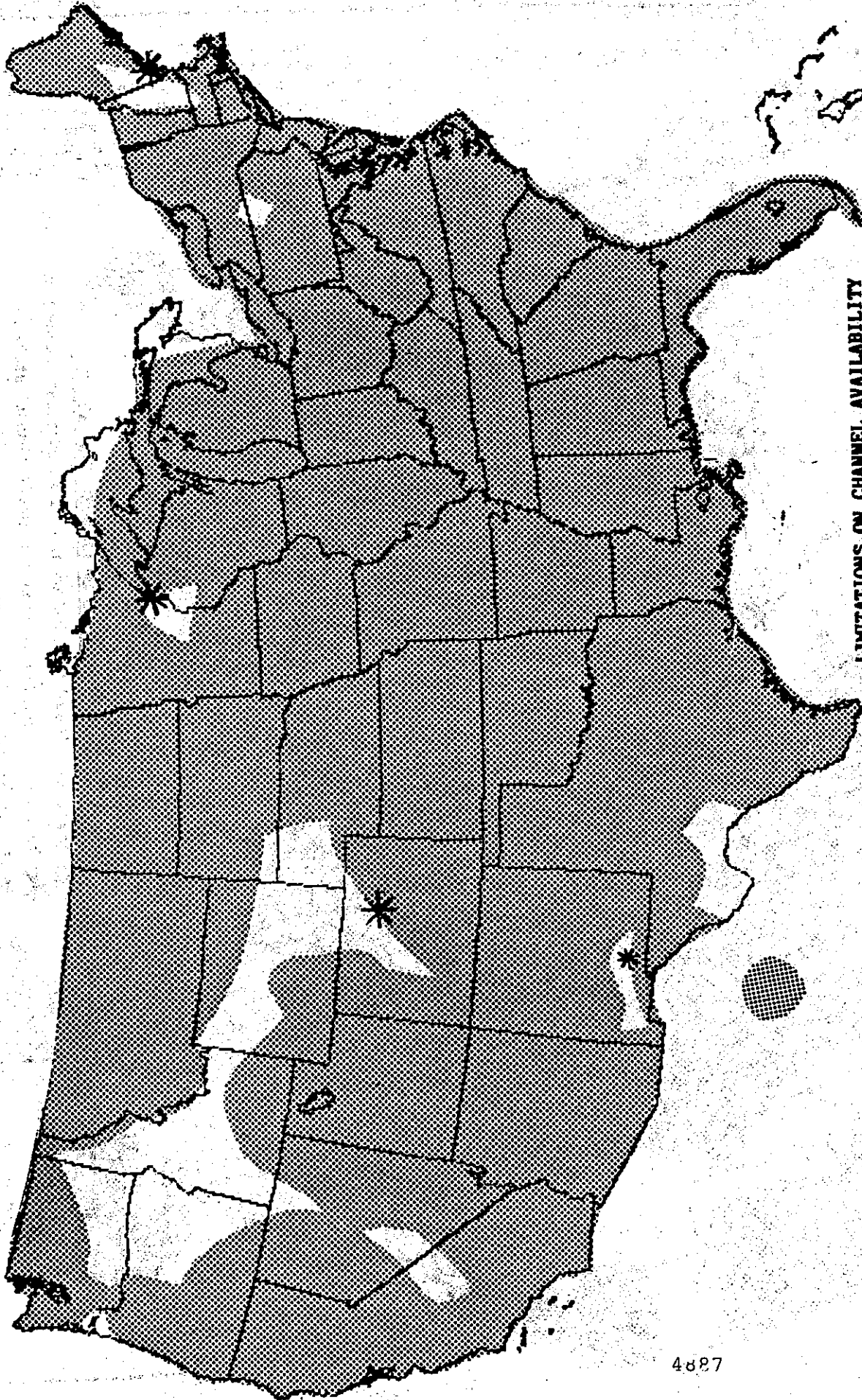
## APPENDIX B

### EXPLANATION OF ATTACHED MAPS DEPICTING AREAS IN WHICH IT MAY BE POSSIBLE TO ESTABLISH NEW FULL-TIME AM STATIONS ON FOREIGN CLEAR CHANNELS




The attached maps depict the current pattern of use for each of the 14 foreign clear channels. They reveal the areas in which it may be possible to establish a new full-time station. These are the areas which remain after the preclusive effects of existing stations have been taken into account as described below.

For each frequency, maps were prepared showing the areas within the pertinent daytime contours of existing co-channel and first adjacent channel stations.<sup>9</sup> These areas, shown by cross-hatching, are ones in which it is not possible to establish a new full-time AM station without producing prohibited interference. It is also important to recognize that further preclusion results from the existence

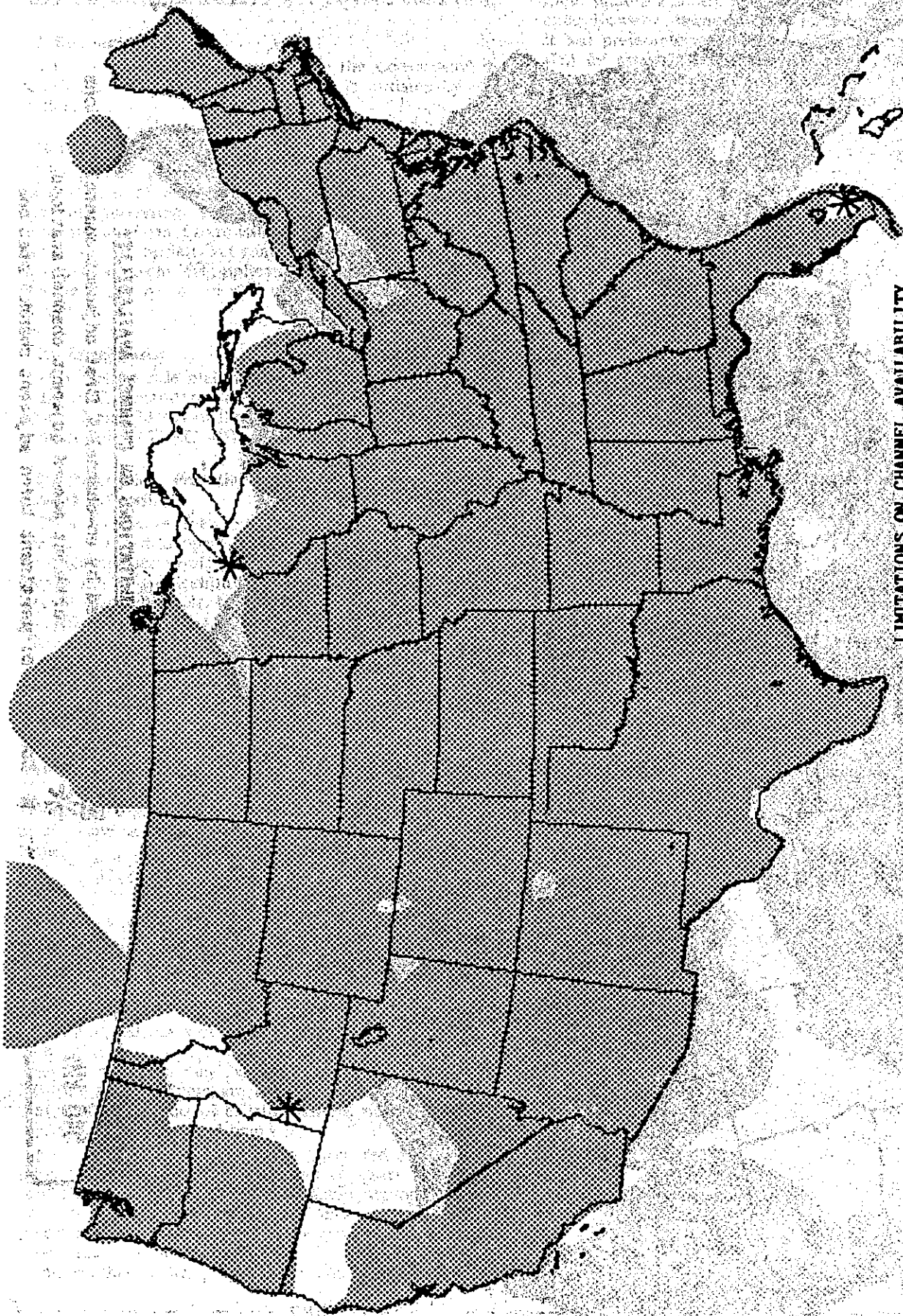
of stations on the second and third adjacent channels, as these stations also are entitled to protection from interference. However, because of the scale of the maps involved, it was preferable to employ a different method of depiction for stations on second and third adjacent channels. These stations are shown by asterisks of two sizes: larger asterisks for second adjacent stations and smaller asterisks for third adjacent channel stations.






**LIMITATIONS ON CHANNEL AVAILABILITY**

-  Areas precluded by co-channel & first adjacent channel stations
-  Location of pertinent second adjacent channel stations
-  Location of pertinent third adjacent channel stations

**540 kHz**

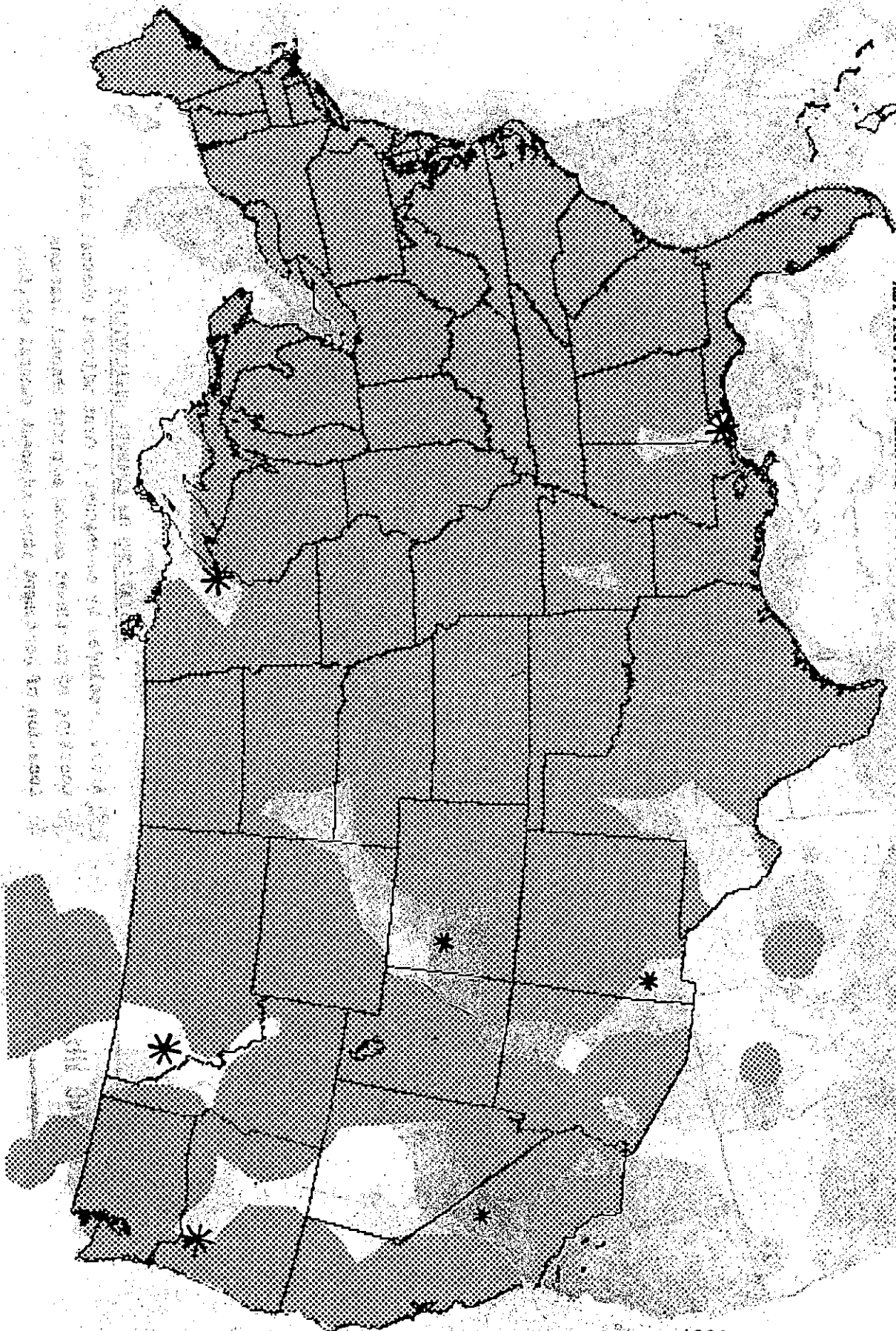


**LIMITATIONS ON CHANNEL AVAILABILITY**

-  Areas precluded by co-channel & first adjacent channel stations
-  Location of pertinent second adjacent channel stations
-  Location of pertinent third adjacent channel stations

690 kHz

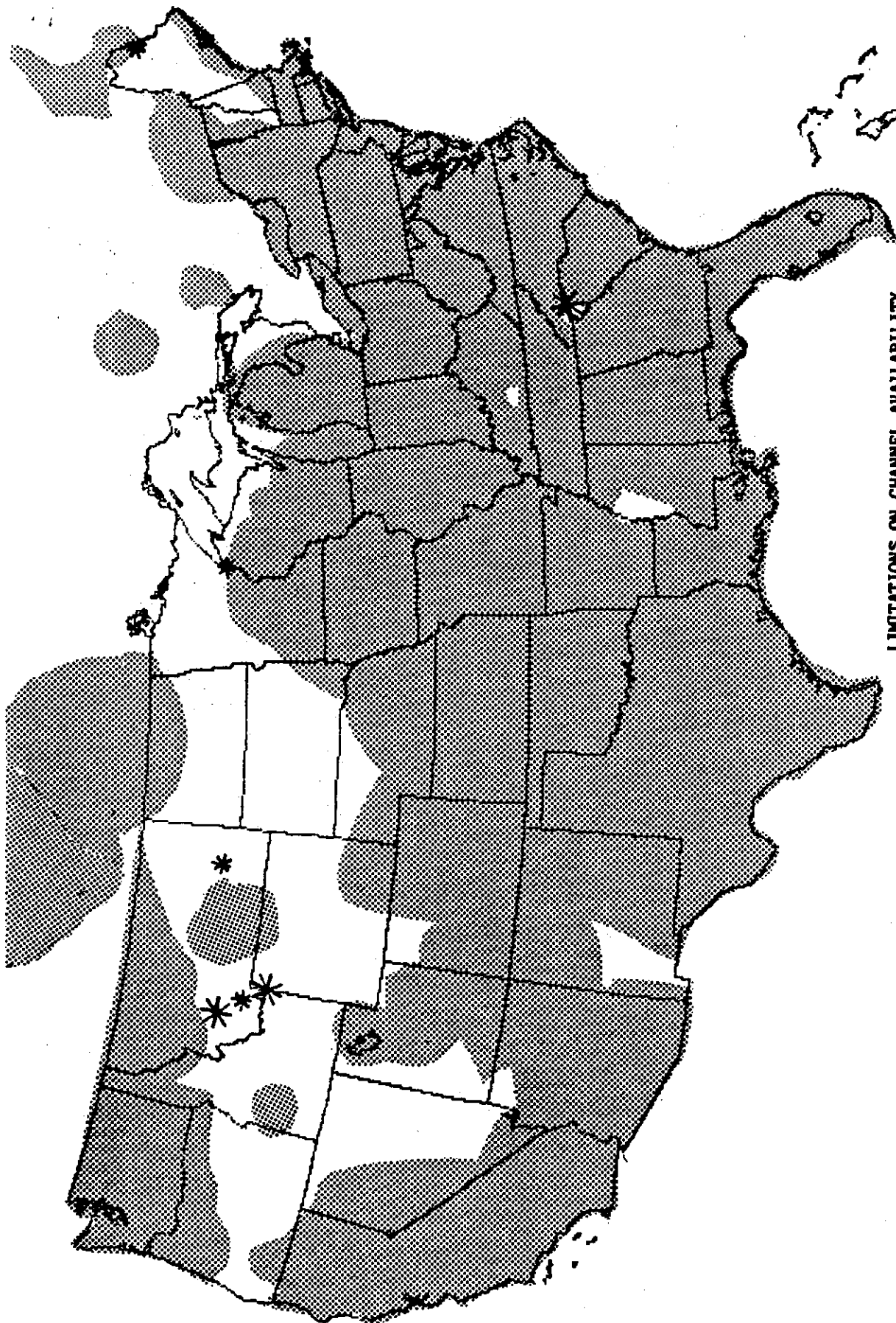




**LIMITATIONS ON CHANNEL AVAILABILITY**

- ▨ Areas precluded by co-channel & first adjacent channel stations
- \* Location of pertinent second adjacent channel stations
- \* Location of pertinent third adjacent channel stations

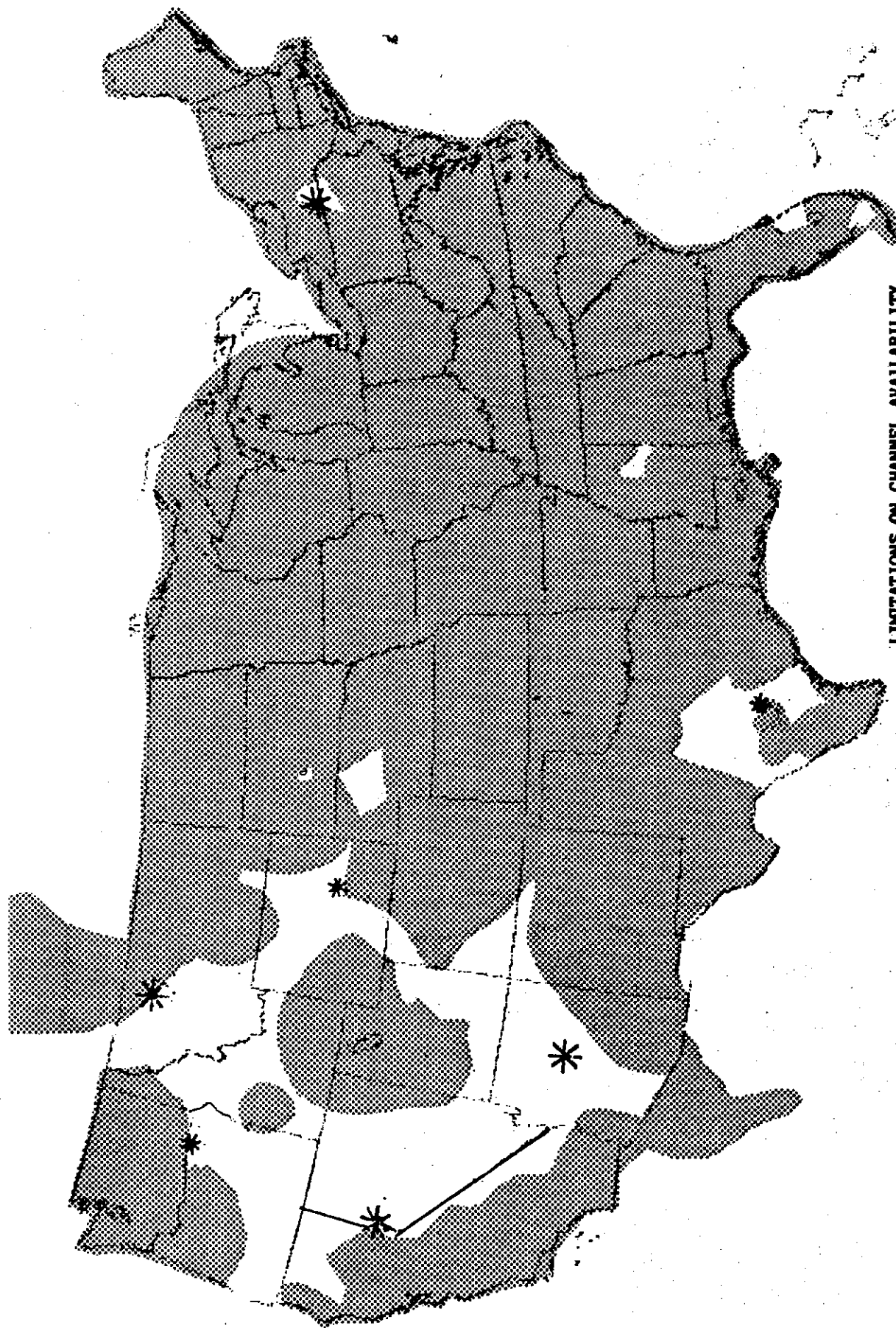
730 kHz






740 kHz

LIMITATIONS ON CHANNEL AVAILABILITY

- ▨ Areas precluded by co-channel & first adjacent channel stations
- \* Location of pertinent second adjacent channel stations
- \* Location of pertinent third adjacent channel stations

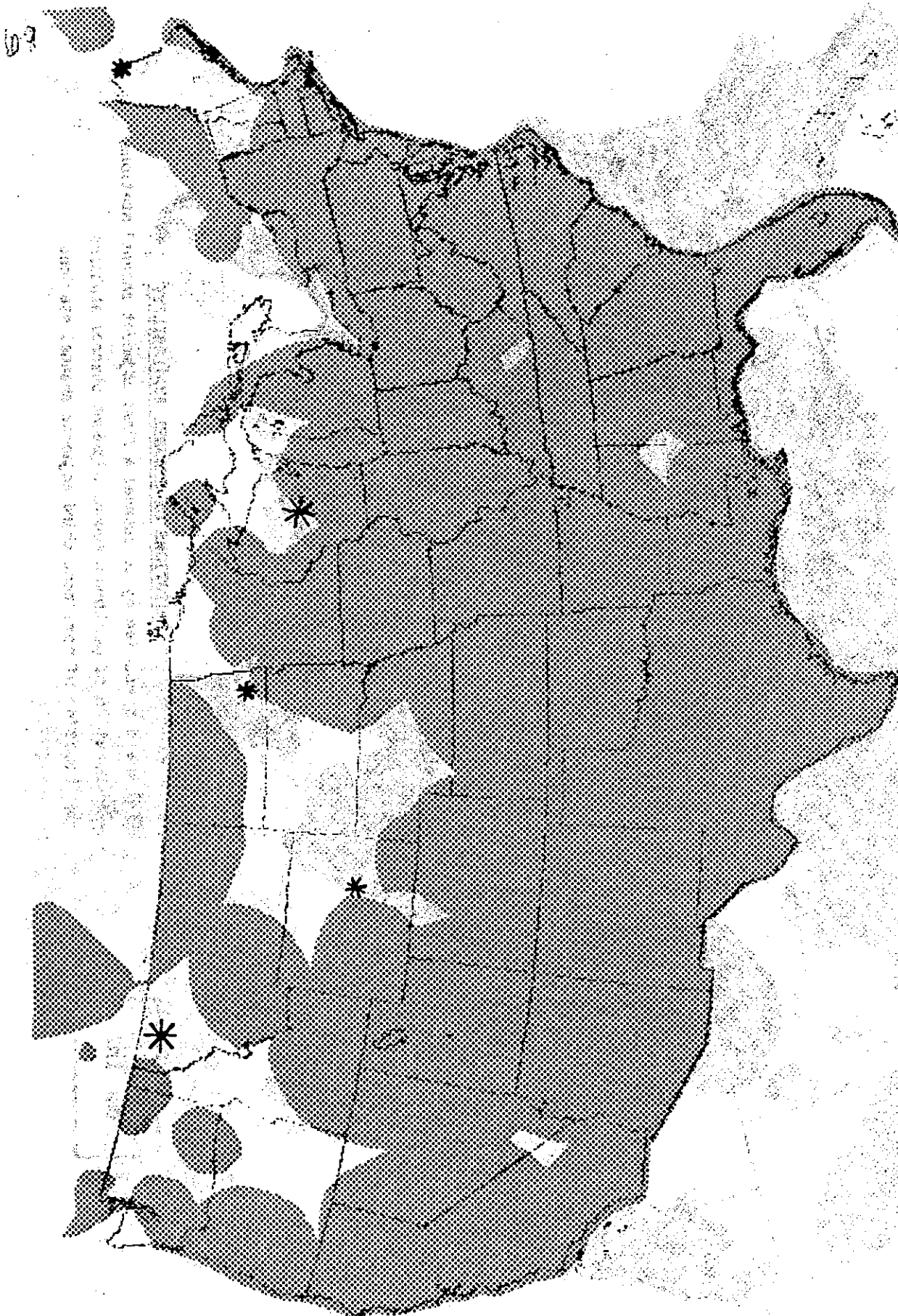


**LIMITATIONS ON CHANNEL AVAILABILITY**

-  Areas precluded by co-channel & first adjacent channel stations
-  Location of pertinent second adjacent channel stations
-  Location of pertinent third adjacent channel stations

800 kHz





**LIMITATIONS ON CHANNEL AVAILABILITY**

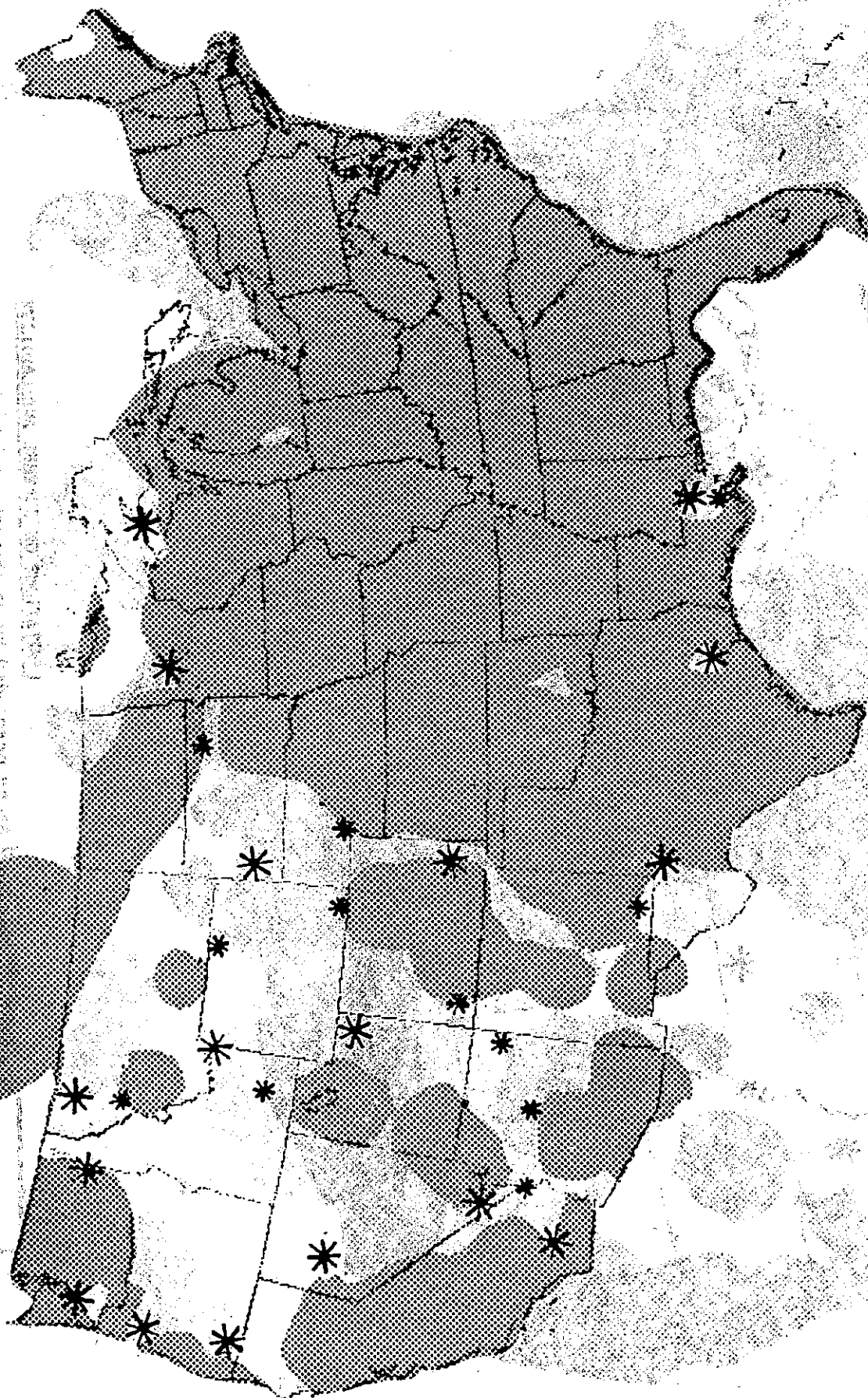
- Areas precluded by co-channel & first adjacent channel stations
- \* Location of pertinent second adjacent channel stations
- \* Location of pertinent third adjacent channel stations

860 MHz

370

Map of the United States showing the locations of the first adjacent channel stations and the second adjacent channel stations for the 900 kHz frequency.

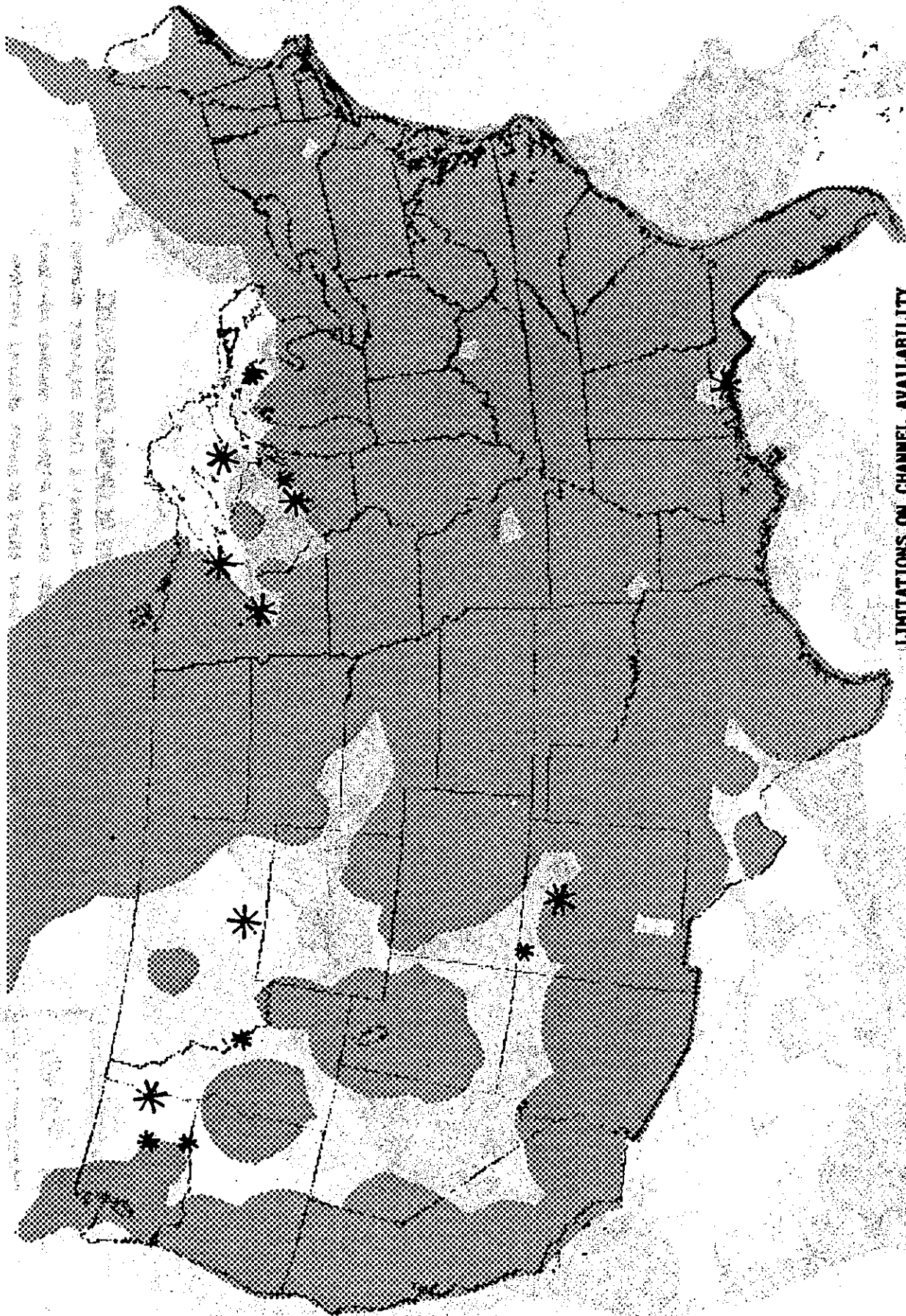
900 kHz






LIMITATIONS ON CHANNEL AVAILABILITY

- ▨ Areas precluded by co-channel & first adjacent channel stations
- \* Location of pertinent second adjacent channel stations
- \* Location of pertinent third adjacent channel stations

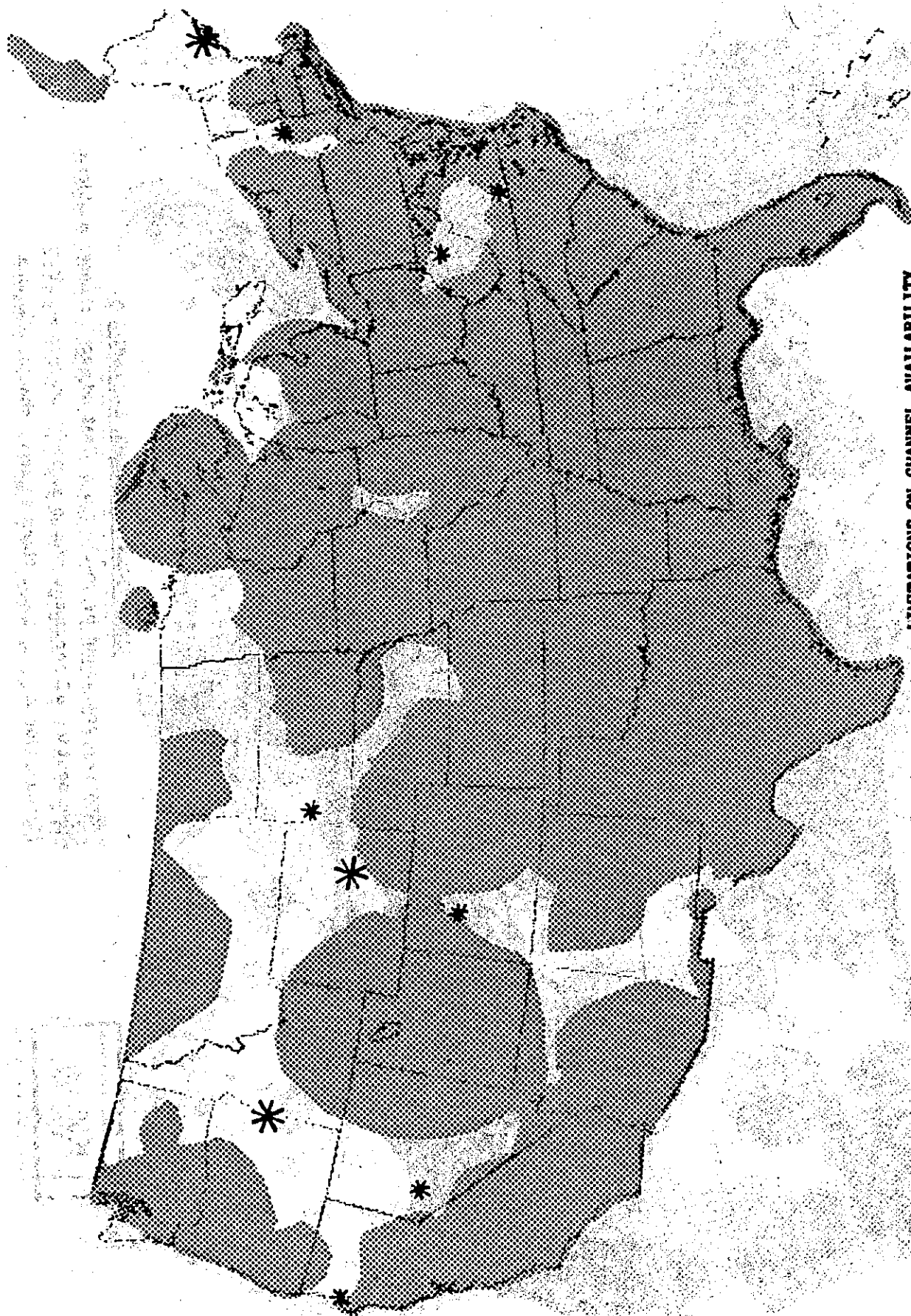
900 kHz






**LIMITATIONS ON CHANNEL AVAILABILITY**

-  Areas precluded by co-channel & first adjacent channel stations
-  Location of pertinent second adjacent channel stations
-  Location of pertinent third adjacent channel stations

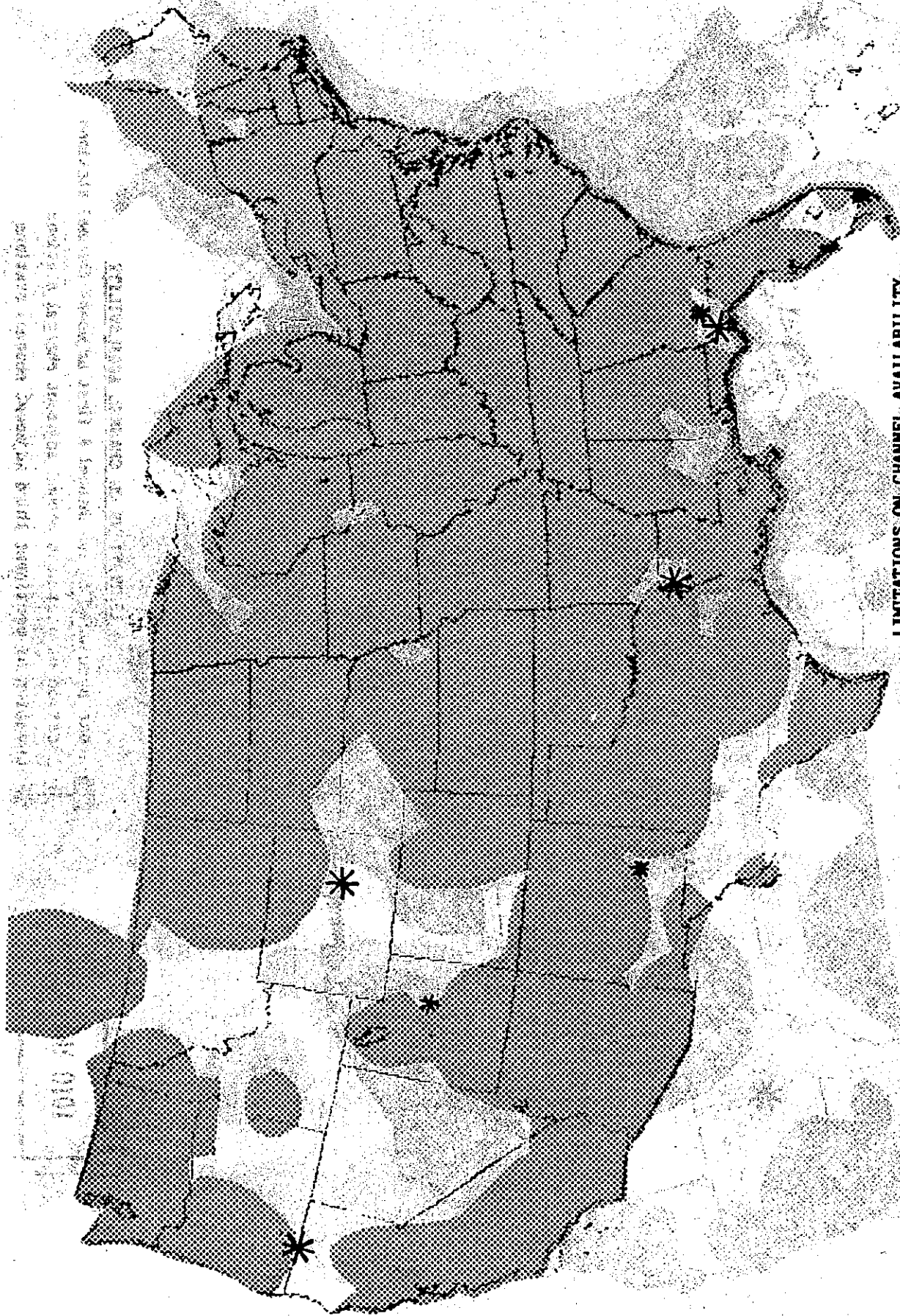
990 kHz






**LIMITATIONS ON CHANNEL AVAILABILITY**

-  Areas precluded by co-channel & first adjacent channel stations
-  Location of pertinent second adjacent channel stations
-  Location of pertinent third adjacent channel stations

1010 kHz

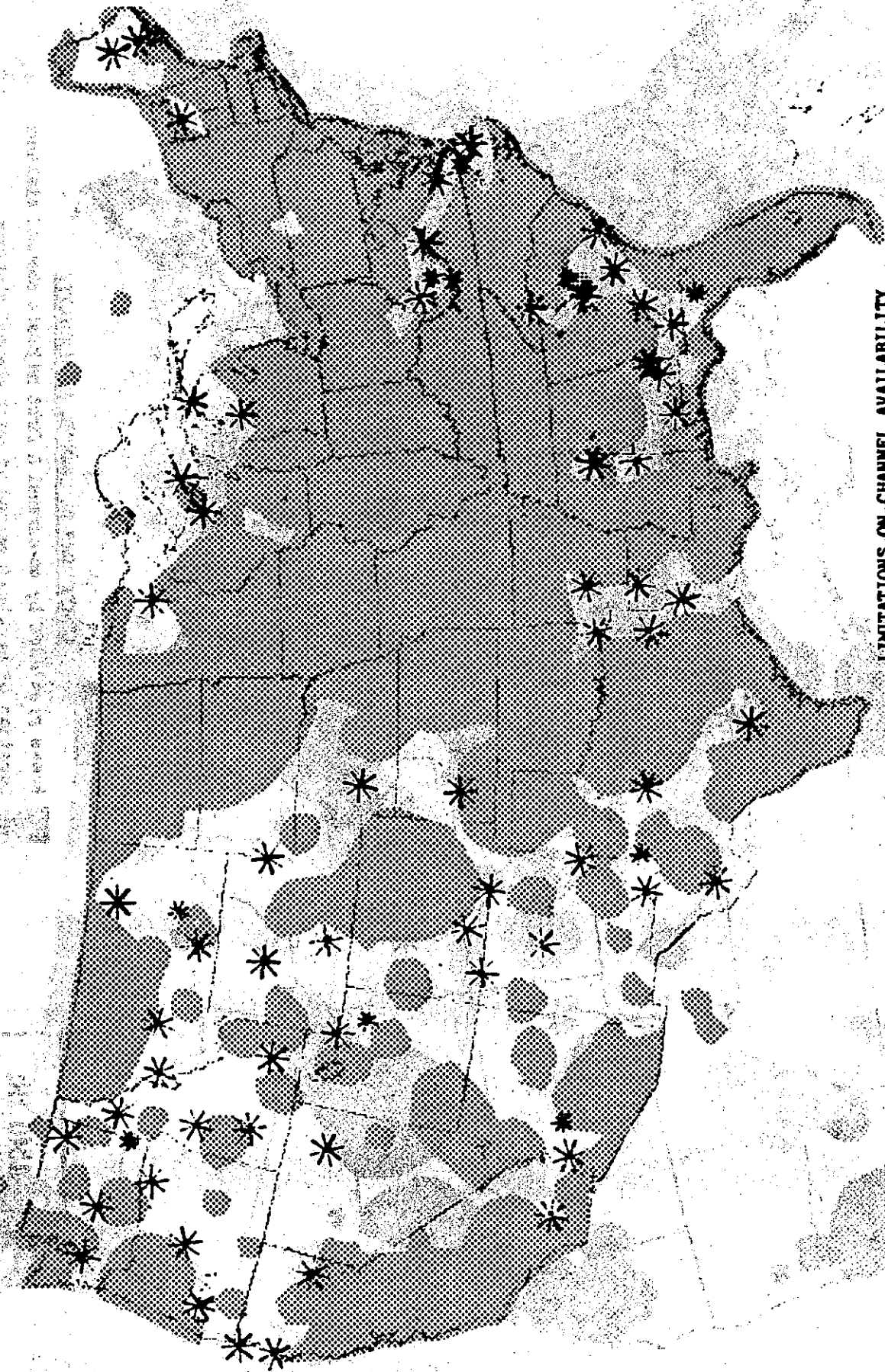


**LIMITATIONS ON CHANNEL AVAILABILITY**


-  Areas precluded by co-channel & first adjacent channel stations
-  Location of pertinent second adjacent channel stations
-  Location of pertinent third adjacent channel stations

1050 kHz

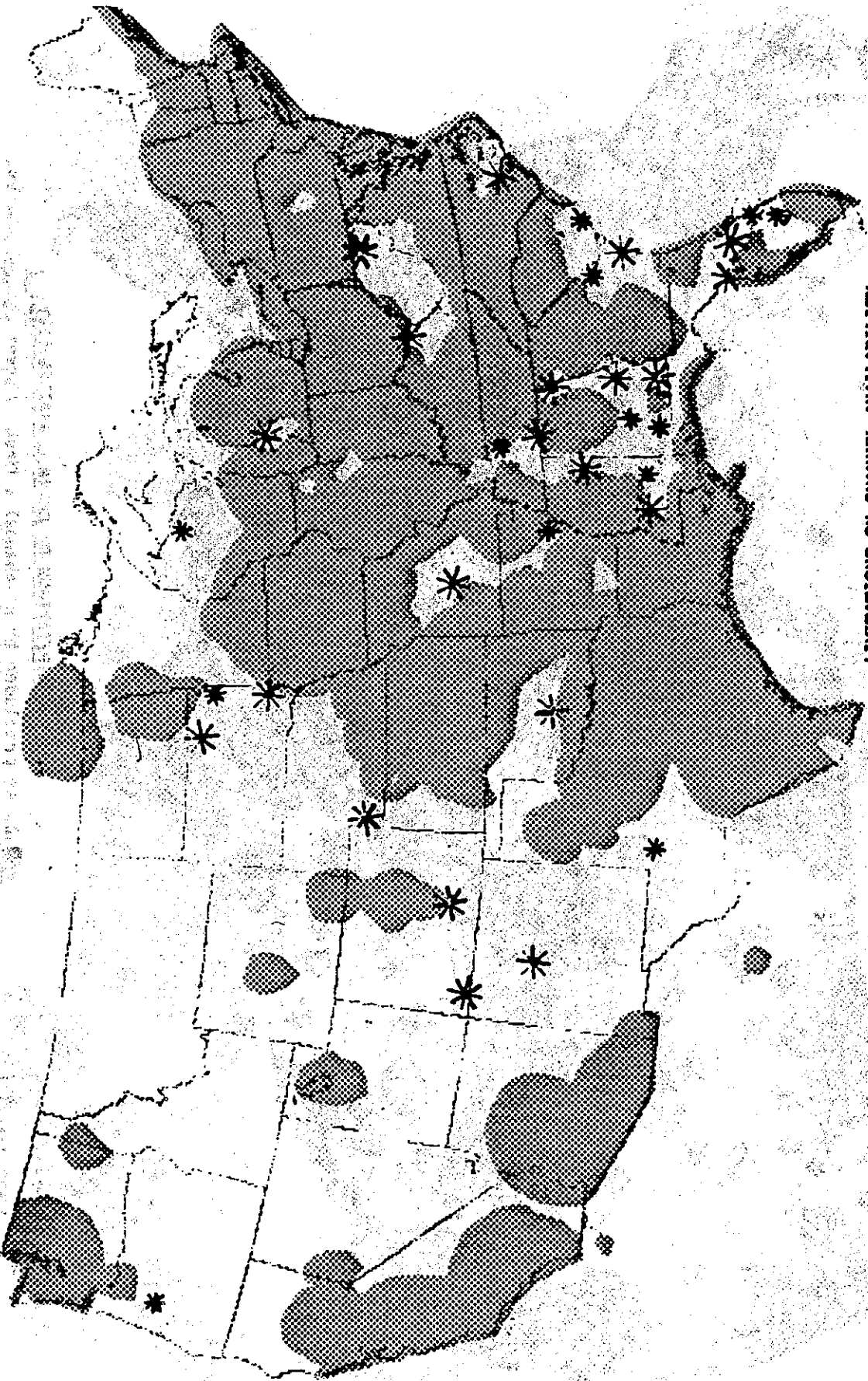







**LIMITATIONS ON CHANNEL AVAILABILITY**

-  Areas precluded by co-channel & first adjacent channel stations
-  Location of pertinent second adjacent channel stations
-  Location of pertinent third adjacent channel stations

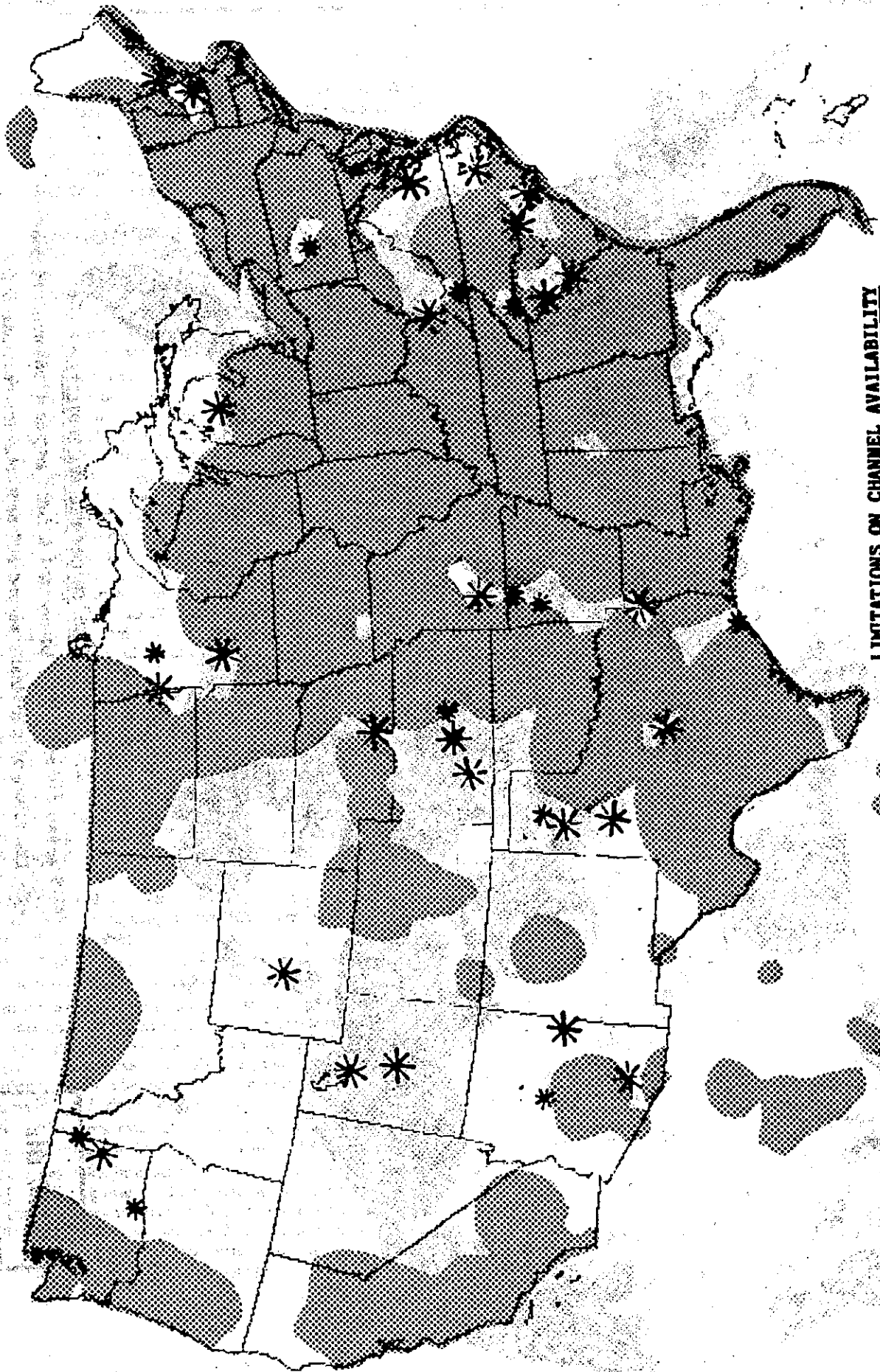
**1220 kHz**



**LIMITATIONS ON CHANNEL AVAILABILITY**

-  Areas precluded by co-channel & first adjacent channel stations
-  Location of pertinent second adjacent channel stations
-  Location of pertinent third adjacent channel stations

1540 kHz



1570 kHz

**LIMITATIONS ON CHANNEL AVAILABILITY**

- ◆ Areas precluded by co-channel & first adjacent channel stations
- \* Location of pertinent second adjacent channel stations
- \* Location of pertinent third adjacent channel stations



**LIMITATIONS ON CHANNEL AVAILABILITY**

- ▨ Areas precluded by in-channel & first adjacent channel stations
- \* Location of pertinent second adjacent channel stations
- \* Location of pertinent third adjacent channel stations

1580-147

## FOOTNOTES

<sup>1</sup> This proceeding was inaugurated by Notice of Proposed Rule Making, 49 FR 18567, published May 1, 1984. The Report and Order, 101 F.C.C. 2d 1, amending the rules to provide for nighttime operations on the 14 foreign clear channels was released on May 7, 1985. A Memorandum Opinion and Order on reconsideration, 103 F.C.C. 2d 532, was released on February 21, 1986.

<sup>2</sup> The North American Regional Broadcasting Agreement (NARBA) designated 540, 690, 740, 860, 990, 1010, and 1580 kHz as Canadian Class I-A clear channels. NARBA also designated 1540 kHz as a Bahamian Class I-A clear channel. The U.S./Mexican Agreement of 1968 designated 540, 730, 800, 900, 1050, 1220, and 1570 as Mexican Class I-A clear channels. Since 540 kHz is designated as a Class I-A clear channel for both Canada and Mexico, the total number of channels involved is 14.

<sup>3</sup> Because of time constraints, the staff was able only to perform daytime calculations on 13 of the 14 foreign clear channels, and was not able to examine the extent to which existing nighttime operations also precluded new stations. Moreover, the staff was able to examine only the effect on co-channel and first adjacent channel stations even though it was recognized that further limitations are imposed on second and third adjacent channel stations. Even with these limitations, the studies clearly established that, because of the technical rules, there were severe restrictions on possible locations for new unlimited-timestations. Several sample maps were prepared to depict the nature of these restrictions graphically. These maps were associated with the Report and Order, 101 FCC 2d, at 23-27. In connection with the Memorandum Opinion and Order on reconsideration, the Commission released the maps for all 13 channels from which sample maps were prepared.

<sup>4</sup> During the pendency of the appeal, two parties filed petitions for reconsideration of the Commission's decision. Neither petition was directed to the issues raised by NBMC. Rather, they dealt only with minor peripheral provisions not involved in the appeal. After review of these petitions, the Commission decided to make a minor revision in the portion of the new rules dealing with applications to modify an existing station by moving it to one of the foreign clear channels. This decision was reflected in the Memorandum Opinion and Order, 103 FCC 2d 532 (1986), on reconsideration.

<sup>5</sup> The Court did not reach NBMC's claim that there was inadequate evidence to support the FCC's decision. NBMC, 791 F. 2d at 1020 n. 2 (1986).

<sup>6</sup> NBMC filed a petition, currently pending, for reconsideration of the Commission's decision in MM Docket No. 85-39.

<sup>7</sup> Restrictions on opportunities for new unlimited-timestations on the foreign clear channels are even more severe than those indicated by the Commission's studies because it was not practicable to factor into those channel-wide studies the fully detailed calculations that must be made case-by-case in order to depict the full effects of interfering skywave signals.

<sup>8</sup> The computer's calculations were based on the technical standards set out in the Commission's Rules, 47 CFR Part 73.

<sup>9</sup> The maps take into account all U.S. stations and foreign stations which, because of their location, are likely to preclude use of the frequency in areas of the U.S. For co-channel stations, the 0.025 mV/m contour was used; for first adjacent channel stations, the 0.5 mV/m contour was used. All contours were computed using the M3 conductivity map.